7-8-2014

Jayo Development, Inc. v. Ada County Bd. of Equalization Appellant's Reply Brief Dckt. 41668

IN THE SUPREME COURT OF THE STATE OF IDAHO

JAYO DEVELOPMENT, INC. Petitioner-Appellant, ADA COUNTY BOARD OF EQUALIZATION, Respondent.	)	SUPREME COURT NO. 41668 Fourth Dist. Case NO. CV OC 2013-7673

APPELLANT'S REPLY BRIEF

Appeal from the District Court of the Fourth Judicial District
for the County of Ada

Honorable Eric J. Wildman, District Judge, Presiding

MICHAEL R. JONES
Attorney at Law
MICHAEL R. JONES, PLLC
P.O. Box 7743
508 North 13th Street
Boise, Idaho 83702
Telephone: (208) 385-7400
Facsimile: (208) 389-9103
Email: mrjones@mrjonesplcc.com

ATTORNEY FOR APPELLANT
Jayo Development, Inc.

CLAIRE TARDIFF
Attorney at Law
Ada County Prosecuting Attorney
200 West Front Street, Room 3191

Boise, Idaho 83702
Telephone: 208-287-7700
Facsimile: 208-287-7719
Email: ctardiff@adaweb.net

ATTORNEY FOR RESPONDENT
Ada County Board of Equalization

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REPLY ARGUMENT

A. In The Absence Of Any Textual Support In The Language Of I.C. § 63-602W(4) Itself, Or As Otherwise Ascertained From Underlying Legislative Intent, The District Court's Construction Of That Statute Must Be Rejected

On the first question presented on this appeal, Ada County has defended the decision of the district court on an issue that it never actually raised before that court, or in any of the earlier administrative proceedings. The district court, sua sponte raised and decided, the issue that the Idaho Legislature's alleged intentional use of the definite article "the," rather than the indefinite article, "a," in its enactment of subsection (4) to I.C. § 63-602W in 2012 was determinative in that court's construction of that subsection as limiting the extent of the site improvement tax exemption to only, "the land developer who made the site improvements."

The just-quoted language does not appear on the face of that statute, nor in any related statutory definition, nor is that implied language supported by the context of the entire statutory regime itself. Ironically, in phrasing this issue on this appeal, the Appellant Jayo Development left out at least one definite article, and several other modifiers, which are indicated in brackets in the restatement of that issue that is set out below:

> 2. Whether the district court in [the] aid of [its] statutory interpretation [of] I.C. § 63-602W(4) impermissibly relied upon "implied" language, ("the land developer who made the site improvements"), that neither appears on the face of the statute itself, nor finds any textual support in any other part of that law?

In addressing this question, Ada County admits the absence of any statutory definition in support of the district court's construction of the statute (Respondent's brief, pg. 5), but then turns to the "purpose and intent" of the legislature, as revealed by a partial quote from the Statement of Purpose that accompanied the bill by which subsection (4) to I.C. § 63-602W was first enacted in 2012. That language, as set out on page 5 of Ada County's Respondent's Brief (a complete copy of that Statement of Purpose was attached as Exhibit C to the July 31, 2013 Affidavit of Michael R. Jones (R., pg. 57)), and as again stated here, declares:

> In the proposed bill, that portion of value created by the site improvements in the course of **a land developer's** business is exempt from property tax until a building begins or the title is conveyed from **the land developer**.

Statement of Purpose, H.B. 519, 61st Idaho Legislature, Second Regular Session (2012) (emphasis added).

Ada County's argument, as set out at the bottom of page 5 and continuing to the top of page 6 of its Respondent's brief, is well taken. It is the creation of the site improvements that enhance the value of the raw land which is the focus of the tax exemption that is at issue on this appeal. While the language used in the 2012 statute was intended to achieve that result, it also unintentionally excluded individuals, such as Doug Jayo, who was the principal owner and investor in both Jayo Construction and Jayo Development. The investment and value created by the site improvements at issue remained just as much a part of Jayo Development, as it was a part of Jayo Construction. This is exactly what was addressed in the 2013 clarification amendment, which point

will be further addressed later in this Reply Brief.

It is important to stay focused on the basis of the district court's decision on this particular point, which was that the Idaho Legislature allegedly made an intentional choice concerning the statutory language of subsection (4) of I.C. § 63-602W to use, "the," rather than, "a" to modify, "land developer," so as **to only indicate** "the land developer who made the site improvements," and to exclude all others. Therefore, the Appellant Jayo Development believes it was rather careless of this same legislature to use both modifiers in the same sentence to describe that same developer in the excerpt from the Statement of Purpose upon which Ada County now relies, as highlighted in the excerpt set out just above. At best, this reference creates some ambiguity. At worst, it cast doubts as to the underlying basis for the district court's entire analysis, which seems rather dubious to begin with.

Finally, in the last two paragraphs of the argument it makes on page 6 of its Respondent's Brief Ada County first asks what it apparently only intended to be a rhetorical question:

> In the event *any* land developer holding the site improvements is entitled to the exemption **until the property is sold**, then when does the value of the site improvements ever become taxable?

(Italicized emphasis in original; bold/underlined emphasis added). The answer to this question seems self-evident. It is when the property is sold, which is implicit in the very purpose of the business of the land developer!! To better understand this, it may be worthwhile to again examine that actual language of subsection (4) which addresses the loss of the exemption:

> (4) Site improvements that are associated with land, such as roads and utilities, on real property held by the land developer, either as owner or vendee in possession under a land sale contract, for sale or consumption in the ordinary course of the land developer's business until other improvements, such as buildings or structural components of buildings, are begun or the real property is conveyed to a third party. For purposes of this subsection, a transfer of title to real property to a legal entity of which at least fifty percent (50%) is owned by the land developer, the land developer's original entity or the same principals who owned the land developer's original entity shall not be considered a conveyance to a third party. [The remainder of the subsection, which has been omitted, addresses how the amount of the exemption is to be determined] . . . .

I.C. § 63-602W(4) (bracketed reference added).

Ada County's final argument, as made at the bottom of page 6 of its brief is, "To read the statute as urged by Appellant would be not only unreasonable but would significantly enlarge the scope of the exemption." Respondent's Brief at pg. 6. Jayo Development's argument is based upon the amendments to I.C. § 63-602W(4) that were actually adopted by the Idaho Legislature in 2013 and that are now the law. Whether or not the effect of this amendment actually did enlarge the scope of the exemption or not, or whether Ada County actively opposed that amendment, is now a moot point. At the time de novo review before the district court was commenced, the case was decided by that court, and this appeal was brought, the position advocated by the Appellant Jayo Development was the law of Idaho, as adopted by the Idaho Legislature.

Whatever minimal support may have ever existed for the district court's construction of the subsection (4) of I.C. § 63-602W, as originally enacted in 2012, had been entirely eliminated by the time the de novo review before the district court had been commenced after the 2013 clarifying

amendment had been enacted, and administrative Rule 620 had been allowed to lapse. Therefore, this Court should reverse the decision of the district court denying Jayo Development the 2012 site improvement tax exemption.

B. Because The District Court Was Bound By The De Novo Standard Of Review Under I.C. § 63-3812(c), The Fact Rule 620 Was No Longer In Effect, And Had In Fact Been Superseded By The 2013 Amendments to I.C. § 63-602W(4) At The Time That Court Undertook Its Review Of This Case, Was Controlling As To Its Decision

On the second question that Ada County has addressed in its Respondent's Brief, concerning the district court's application and continued reliance upon the then-lapsed Rule 620 at the time it rendered its decision on de novo review, Ada County has argued that, "Appellant has not cited any case law holding that appellate courts are to take into account the *expiration* of an administrative regulation when making a decision on appeal." *See*, Respondent's Brief at pg. 7, last sentence (Italicized emphasis in original).

When Jayo Development filed its initial Petition for Judicial Review before the district court on April 30, 2013, it noted in the second paragraph of that petition that, "This petition for judicial review shall be determined upon a trial de novo, as provided by I.C. § 63-3812(c)." (R., pg. 5).[1] An

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[1] That subsection of I.C. § 63-3812 provides as follows:

> (c) Appeals may be based upon any issue presented by the appellant to the board of tax appeals and shall be heard and determined by the court without a jury in a trial de novo on the issues in the same manner as though it were an original proceeding in that court. The burden of proof shall fall upon the party seeking affirmative relief to establish that the decision made by the board of tax appeals is erroneous. A preponderance of the evidence shall suffice to sustain the burden of proof. The burden of proof shall fall upon the party seeking affirmative relief and the

appeal upon a trial de novo means that the case was to be tried before the district court as if it had never been heard before. *Turner v. City of Twin Falls*, 144 Idaho 203, 211, 159 P.3d 840, 848 (2007), *citing to*, *Gilbert v. Moore*, 108 Idaho 165, 168, 697 P.2d 1178, 1182 (1985). The judicial review statute, I.C. § 63-3812(c), as set out in the footnote below, declares that the appeal will be heard "in the same manner as though it were an original proceeding in that court." Inherent in such a trial de novo proceeding is the ability to present evidence that was either not presented, or was not available, in the earlier administrative proceedings. *See*, I.C. § 63-3812(c) and *Canyon County Board of Equalization v. Amalgamated Sugar Co.*, 143 Idaho 58, 60, 137 P.3d 445, 447 (2006) ("Where the district court conducts a trial de novo in an appeal of a BTA decision, this Court defers to the district court's findings of fact that are supported by substantial evidence, ...").

Jayo Development already has set out in its opening brief on this appeal the chronology of events that existed at the time it filed its Petition for Review before the district court in 2013, and the then-known effect of the legislative action that had been taken by the 2013 Idaho Legislature on Rule 620, as expressly declared in the Statement of Purpose to that 2013 legislation.* That single paragraph from Jayo Development's opening brief is again restated here:

> burden of going forward with the evidence shall shift as in other civil litigation. The court shall render its decision in writing, including therein a concise statement of the facts found by the court and conclusions of law reached by the court. The court may affirm, reverse or modify the order, direct the tax collector of the county or the state tax commission to refund any taxes found in such appeal to be erroneously or illegally assessed or collected or may direct the collection of additional taxes in proper cases.

> Jayo Development Inc.'s petition for de novo review by the district court was filed on April 30, 2013 (R., pg. 4), shortly after the 2013 Idaho Legislature had adjourned on April 4, 2013. The 2013 clarifying amendments to I.C. § 63-602W(4) became law on April 4, 2013 without the governor's signature, retroactive to January 1, 2013. *See*, 2013 Ida.Sess.L, Ch. 276, § 2, pg. 715. A portion of the Statement of Purpose that accompanied the 2013 clarifying amendments declared in respect to this question that:
>
> > The State Tax Commissioners voted in November 2012 to allow the Site Improvement temporary administrative rule 620T to expire. They did not approve a permanent administrative rule with the recommendation that new legislation this session would provide the needed clarification.
>
> Statement of Purpose, H.B. 242, Sixty Second Idaho Legislation, First Session (2013) (R., pg. 59).

Jayo Development's Appellant's Brief at pp. 24-25.

Ada County has further argued that, "Appellant has failed to cite any expression of legislative intent indicating that the Idaho Legislature intended for the expiration of Rule 620 to have any retroactive effect on decisions regarding exemption for tax year 2012." *See*, Respondent's Brief, at pg. 8. Of course, the just-cited declaration that was made in the Statement of Purpose to the 2013 "clarifying amendment," is certainly an expression of legislative intent as to the "needed clarification" as to the original intent of the 2012 enactment of the exemption. But perhaps more to the point are the long-standing rules of law that apply in this situation, first as summarized in *Hamilton v. Reeder Flying Service*, 135 Idaho 568, 21 P.3d 890 (2001):

> An agency construction will not be followed if it contradicts the clear expression of the legislature. *Rim View Trout Co. v. Higginson*, 121 Idaho 819, 824, 828 P.2d 848, 853 (1992). In other words, if the language is unambiguous, an

> agency's interpretation contrary to the plain meaning of the statute will not be given deference. *Id.* at 824, 828 P.2d at 853. If the statutory language is clear and unambiguous, statutory construction is unnecessary and this Court need merely apply the statute. *Kootenai Elec. Coop., Inc. v. Washington Water Power Co.*, 127 Idaho 432, 435, 901 P.2d 1333, 1336 (1995). . . .

135 Idaho at 572, 21 P.3d at 894. This rule is buttressed by the related principle that a court should not enforce an agency regulation that is nothing more than an attempt to re-write a statute. *Moses v. Idaho State Tax Commission*, 118 Idaho 676, 680-81, 799 P.2d 964, 968-69 (1990) and *Bogner v. State Dept. of Revenue and Taxation*, 107 Idaho 854, 856, 693 P.2d 1056, 1058 (1984).

In sum, at the time de novo review was commenced before the district court, Rule 620 had lapsed in deference to the legislative clarification of I.C. § 63-602W(4), which had become law almost a month before Jayo Development filed its Petition for Judicial Review. As argued below in further reply to the response of Ada County on this appeal, those 2013 amendments to that statute operated to clarify the meaning of subsection (4) to I.C. § 63-602W, as originally enacted in 2012, and therefore should operate and be given effect to Jayo Development's tax exemption claim for the 2012 tax year.

C. The Rule On The Application Of "Clarifying Amendments," And The Rule On Retroactive Application Of New Laws, Are Separate Rules Of Statutory Construction That Are To Be Independently Applied

Ada County has cited and relied upon a California U.S. District Court decision, which itself construes and applies California law, in rebuttal to the Idaho law that was cited and relied upon by Jayo Development in its opening brief concerning the 2013 clarification amendment to I.C. § 63-

602W(4). *See*, Respondent's Brief, at pp. 10-11. As a general rule Idaho courts are not bound by the Idaho federal court's interpretation of Idaho law, much less being bound by a California federal court's interpretation of unrelated California law. *See*, *Castorena v. General Electric*, 149 Idaho 609, 620, 238 P.3d 209, 220 (2010) ("This Court is not bound by federal courts' interpretations of Idaho law, *see State v. Harmon*, 107 Idaho 73, 76, 685 P.2d 814, 817 (1984), such interpretations have no precedential authority with this Court. Furthermore, we disagree with the *Adams* court's analysis. [referring to the cited analysis of the U.S. District Court for Idaho in, *Adams v. Armstrong World Industries*, 596 F.Supp. 1407 (D.Idaho 1984), *rev'd on other grounds by*, 847 F.2d 589 (9th Cir.1988)]").

As based upon this cited California authority, Ada County has then argued that the Idaho Legislature's declaration as to its own intent, as set out in the Legislature's Statement of Purpose to the 2013 clarifying amendment (R., pg. 59) is not determinative of the legislature's intent. *See*, Respondent's Brief, at pg. 11. While legislative history in Idaho has always been rather scant, these "Statements of Purpose," have been in use by the Idaho Legislature for well over forty years and have in fact been relied upon by the courts for "guidance" as to legislative intent in a variety of contexts. *See e.g.*, *Farmers National Bank v. Green River Dairy, LLC*, 155 Idaho 853, 860, n.4, 318 P.3d 622, 629 n. 4 (2014) ((J., J. Jones, dissenting). In addition to the 2013 Statement of Purpose, a sampling of the testimony provided recorded before the germane legislative committees (R., pp. 61-73) confirmed the clarifying purpose behind the 2013 amendment to subsection (4) of I.C. § 63-

602W(4) concerning the conveyance language. *See*, Appellant's Brief at pp. 20-21. There is little else in the way of legislative history in Idaho upon which to rely.[2]

Both the original enactment of subsection (4) of I.C. § 63-602W in 2012, and the 2013 clarification amendment to that subsection, were passed the Idaho Legislature with "retroactivity clauses." The 2012 Act declared:

> SECTION 3. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and approval, and retroactively to January 1, 2012.

Chapter 192 of the Laws of 2012, § 3 at pg. 519. And the 2013 Act likewise declared:

> SECTION 2. An emergency existing therefor, which emergency is hereby declared to exist, this act shall be in full force and effect on and after its passage and

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[2] Justice Jim Jones, in dissent, in *Farmers National Bank v. Green River Dairy*, commented as follows:

> Although the statement of purpose that accompanies a piece of legislation may not always be the best source for determining legislative intent, this Court has often looked to the statement of purpose for guidance. In *KGF Development, LLC v. City of Ketchum*, 149 Idaho 524, 236 P.3d 1284 (2010), we looked to the statement of purpose accompanying a bill to determine the Legislature's intent behind a statute, as well as a city's statement of purpose for an ordinance to determine the intent behind the ordinance. *Id.* at 528-29, 236 P.3d at 1288-89. Likewise, in *Stuart v. State*, 149 Idaho 35, 44, 46, 232 P.3d 813, 822, 824 (2010), we placed reliance on a legislative statement of purpose in determining legislative intent. Here, the Statement of Purpose is consistent with statements made before legislative committees by the bill's sponsor, a respected member of the Legislature. While opposition statements focus on the efficacy of the language in the bill to accomplish the stated intent, there is no dispute as to the intended purpose of the bill.

155 Idaho at 860, n.4, 318 P.3d at 629 n. 4 (J., J. Jones, dissenting).

approval, and retroactively to January 1, 2013.

Chapter 276 of the Laws of 2013, § 2 at pg. 715.

Both of the two retroactivity clauses as contained in each of these enactments is squarely within the authority conferred under I.C. § 73-101. What the Appellate Jayo Development has argued for on this appeal, as supported by the Idaho authority cited in its opening brief, is supported by the general authority provided by Sutherland on Statutory Construction, as also cited in its opening brief. The Sutherland treatise declares:

> An amendment which in effect construes and clarifies a prior statute must be accepted as the legislative declaration of the meaning of the original act, where the amendment was adopted soon after the controversy arose concerning the proper interpretation of the statute. This has led courts to logically conclude that a [sic] amendment was adopted to make plain what the legislation had been all long from the time of the statute's original enactment.

1A Sutherland Statutory Construction § 22:31 *Construction of amendatory acts – Defects in original act.* Although not cited by Sutherland, *State v. Reed*, 154 Idaho 120, 123, 294 P.3d 1132, 1135 (2012) cites the general proposition that, "the legislature also makes amendments to clarify or strengthen the existing provisions of a statute," and citing in support, *Pearl v. Bd. of Prof'l Discipline of Idaho State Bd. of Med.*, 137 Idaho 107, 113-14, 44 P.3d 1162, 1168-69 (2002); *State v. Barnes*, 133 Idaho 378, 384, 987 P.2d 290, 296 (1999); *Stonecipher v. Stonecipher*, 131 Idaho 731, 735, 963 P.2d 1168, 1172 (1998); *State ex rel. Wright v. Headrick*, 65 Idaho 148, 156, 139 P.2d 761, 763 (1943); and *In re Segregation of School Dist. No. 58 from Rural High School District No. 1*, 34 Idaho 222, 228-29, 200 P. 138, 139 (1921) ("However, every change of phraseology does not

indicate a change of substance and intent. The change may be made to express more clearly the same intent or improve the diction, or it may be the result of oversight or carelessness.").

In sum, the "express retroactivity" of a statute by means of legislative declaration, and the "clarification" of a statute by operation of law, involve two separate and distinct questions of statutory construction. The fact that the entire 2013 statute was made retroactive to January 1, 2013 in its operation in no way affects the question of whether the changes in the "conveyance" language in the 2013 amendment were simply intended by the legislature to clarify how that statute was to operate from the time it was originally enacted in 2012 and therefore should be given effect from the date of that original enactment, as of January 1, 2012. Therefore, Jayo Development should be extended the full benefit of the site improvement tax exemption from the time of its first enactment in 2012.

D. Ada County Is Not Entitled To An Award Of Attorney Fees Under I.C. § 12-117(1) On This Appeal

Ada County, should it prevail on this appeal, has requested an award of attorney's fees under I.C. § 12-117(1) on the basis that, "Appellant ignores well settled law on the authority of a court to rely on an agency regulation construing a statute and on the retroactive application of a statutory amendment." *See*, Respondent's Brief at pg. 12.

Ada County's request for attorney's fees should be denied. At the time the de novo appellate review before the district court was commenced in this case, the administrative rule upon which Ada County and the district court have relied had lapsed and become a nullity in express deference to the

legislative action taken by the 2013 Idaho Legislature. *See*, Statement of Purpose to H.B. 242, Sixty-Second Idaho Legislature, 1st Sess (2013) (R., pg. 59) ("The State Tax Commissioners voted in November 2012 to allow the Site Improvement temporary administrative rule 620T to expire. They did not approve a permanent administrative rule with the recommendation that new legislation this session would provide the needed clarification.").

There is no support in the record for the district court's construction of the statute. Ada County's continued reliance upon the administrative rule after the definitive action taken by the 2013 Idaho legislature flies in the face of the settled rules of law that an agency's construction of law will not be followed if it contradicts the clear expression of the legislature, or if it is nothing more than an attempt to re-write the statute. *Hamilton v. Reeder Flying Service*, 135 Idaho 568, 572, 21 P.3d 890 894 (2001); and *Moses v. Idaho State Tax Commission*, 118 Idaho 676, 680-81, 799 P.2d 964, 968-69 (1990). Here the legislative record supports the 2013 amendment as a clarification of the 2012 enactment of subsection (4) to I.C. § 63-602W entitling the Appellant Jayo Development to the site improvement tax exemption. Consequently, Ada County's request for an award of attorney's fees should be denied.

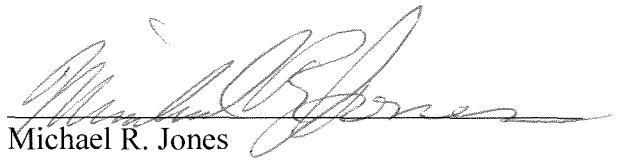
II.

CONCLUSION

The decision of the district court denying Jayo Development, Inc. the site improvement property tax exemption for 2012 should be reversed. Jayo Development should be awarded its costs

and attorney's fees incurred in bringing this appeal.

Respectfully Submitted this 8th day of July, 2014.

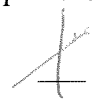


Michael R. Jones
Attorney for the Appellant
Jayo Development, Inc.

CERTIFICATE OF SERVICE

I HEREBY CERTIFY That on this 8th day of July, 2014 two true and correct copies of the foregoing APPELLANT'S REPLY BRIEF were served upon the following:

Claire Tardiff
Ada County Prosecuting Attorney
Ada County Courthouse
200 W. Front Street, Rm. 3191
Boise, Idaho 83702



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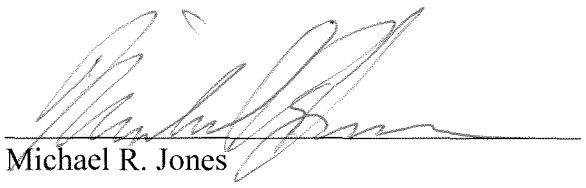

Michael R. Jones